STATE OF MICHIGAN

COURT OF APPEALS

MONICA MARTIN, Plaintiff-Appellant,	UNPUBLISHED December 15, 2011
v	No. 299701 Oakland Circuit Court
THE FOURMIDABLE GROUP, INC., Defendant-Appellee.	LC No. 2009-102844-NO

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). The trial court granted summary disposition because it found that the defective tile condition that plaintiff alleges as the cause of her fall was open and obvious and possessed no "special aspects" that rendered it effectively unavoidable or unreasonably dangerous. We affirm.

Plaintiff alleged that she was injured by tripping over defective floor tiling at the top of a flight of stairs in her rental apartment, causing her to fall down the stairs. She alleged that defendant was negligent, both at common law and under the Michigan Housing Law, MCL 125.401 *et seq.*, and MCL 554.139. Defendant was the company hired by the owners of the property, Royal Oak Housing Commission, to maintain the property.

On appeal, plaintiff argues that the trial court erred in signing an order granting defendant's motion for summary disposition "with prejudice," in determining that defendant owed no statutory duty of care to plaintiff under the Michigan Housing Law, and additionally erred in determining that summary disposition was appropriate based on the determination that the condition of the broken tiling was open and obvious.

I. SUMMARY DISPOSITION "WITH PREJUDICE"

Plaintiff, in propria persona, first argues in her brief on appeal that the trial judge erred in signing an order dismissing plaintiff's claim with prejudice when "[t]he transcript of [the] motion hearing of July 28, 2010 clearly shows without prejudice." (Emphasis in original.) This assertion is without any merit. The trial court stated at the motion hearing:

> In light of the foregoing, the Court agrees that the evidence, even when viewed in a light most favorable to plaintiff, compels a finding that the condition on which plaintiff tripped was open and obvious . . . .
>
> Therefore, summary disposition is appropriate pursuant to MCR 2.116(C)(10). Plaintiff's claim is dismissed.

It is clear that the trial court did not indicate that the dismissal was "without prejudice" as plaintiff claims. Moreover, it is well established that a court speaks through its orders, decrees, and judgments, not its oral pronouncements or its opinions. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009).

Plaintiff also alleges that "[i]n order for an order of a court to say 'with prejudice,' the judge has to say it on the record." However, plaintiff cites no authority in support of this position, and it is not for this Court to search for it. *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007). Accordingly, this argument is abandoned. *Hughes v Almena Twp*, 284 Mich App 50, 71-72; 771 NW2d 453 (2009).

II. SUMMARY DISPOSITION – MCR 2.116(C)(10)

Next, plaintiff argues that the trial court erred when it granted summary disposition in favor of defendant. We disagree.

On appeal, this Court reviews a trial court's decision on a motion for summary disposition made under MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

A negligence claim requires that a plaintiff prove the following four elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The duty a land possessor owes to those who enter the possessor's land is determined by the status of the visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Michigan recognizes three traditional categories of visitors: trespasser, licensee, and invitee. *Id.* It is not contested that plaintiff was an invitee. A possessor of land has a duty to invitees to "inspect the premises and, depending on the circumstances, make any necessary repairs or warn of any discovered hazards." *Id.* at 597.

A. STATUTORY DUTY

Plaintiff asserts that defendant, in not repairing the broken tile in her apartment, breached specific statutory duties owed her under the Housing Law of Michigan, MCL 125.401 *et seq.*, and MCL 554.139.

MCL 554.139 states in relevant part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants willful or irresponsible conduct or lack of conduct.

However, the statute imposes *covenants* in the *lease* between a landlord and tenant. *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Any protection that arises from this statute is purely contractual in nature. *Id.* Thus, any negligence or premises liability claims are unaffected since "any remedy under the statute would consist exclusively of a contract remedy." *Id.* at 426. Therefore, any potential protections afforded by MCL 554.139 have no effect in this appeal.

Plaintiff also attempts rely on several other provisions of the Michigan Housing Law as imposing a statutory duty to defendant as an agent of the owner, Royal Oak Housing Commission. However, nearly all of the specific sections cited by plaintiff solely refer to the duties of an "owner." See MCL 125.471 (" . . . shall be kept in good repair by the owner"); MCL 125.536 ("When the owner of a dwelling . . . ."); MCL 125.471 (" . . . shall be kept in good repair by the owner"). Moreover, MCL 125.533(1) eliminates no doubt of who must comply with the act: "The *owner* of premises regulated by this act shall comply with all applicable provisions of the act." (Emphasis added.)

Plaintiff is correct in that MCL 125.538 does reference "owner or agent thereof"; however, that provision does not impose a statutory duty on said agent. MCL 125.538 provides that, "It is unlawful for any owner or agent thereof to keep or maintain any dwelling or part thereof which is a dangerous building as defined in [MCL 125.539]." MCL 125.539, in turn, defines "dangerous building" as having one or more serious defects. Examples of these serious defects include not conforming to the fire code, the building's structural stability not meeting the minimum requirements, part of the building is likely to fall, part of the building is likely to collapse, etc. But plaintiff on appeal does not argue or explain how her apartment met any of the conditions enumerated in MCL 125.539. Thus, plaintiff's reliance on MCL 125.538 and MCL 125.539 is misplaced.

Because the various statutes cited by plaintiff do not apply to the present circumstances, we hold that defendant owed no statutory duty to plaintiff.

B. OPEN AND OBVIOUS

Because no applicable statutory duty has been identified, defendant can avail itself of all common-law "defenses," including the open and obvious doctrine. See *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002). While a possessor of land "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land," that duty does not require a possessor to protect an invitee from dangers that are "open and obvious." *Benton v Dart Properties*, 270 Mich App 437, 440-441; 715 NW2d 335 (2006).

Determining if a danger is open and obvious utilizes an objective test. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 119-120; 689 NW2d 737 (2004) (Griffin, J., dissenting), adopted in 472 Mich 929 (2005). The test is whether "an average user with ordinary intelligence" would have been "able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

This Court has found hazardous conditions associated with steps to be open and obvious when a reasonable plaintiff, in fact, notes the condition and the danger it represents. In *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002), this Court held that the danger presented was open and obvious when the plaintiff saw and recognized that the steps were "snowy and icy," yet decided to use them anyway. Here, like the plaintiff in *Corey*, plaintiff admitted that she was aware of the broken tile on the top of the steps and decided to use the steps in any event. Therefore, we hold that the danger was similarly open and obvious.

However, if there are "special aspects" that make the open and obvious condition "unreasonably dangerous," then the premises possessor's duty to undertake reasonable precautions to protect invitees remains intact. *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001). "Special aspects" are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id.* at 519. Thus, plaintiff could only establish defendant's liability if some special aspect of the condition made it effectively unavoidable or unreasonably dangerous.

No such special aspects exist in the instant case. Although plaintiff was required to traverse the *steps* several times a day, the *hazard* was not effectively unavoidable. Here, a photograph taken by plaintiff was submitted by defendant along with its motion for summary disposition. At her deposition, plaintiff circled the area on the photograph[1] containing the

[1] Plaintiff, in her brief on appeal, also argues that the trial court erred when it relied on the photographs because they were not clear. However, regardless of their clarity, the trial court was *required* to consider them, along with any pleadings, affidavits, depositions, admissions, and

chipped tile that she claims was the cause of her fall. Although there are no dimensions on the photograph, it is clear that the "hazard" is located on the left side of the stairway opening, leaving approximately 75 percent of the width free of any hazard. Thus, the hazard was not effectively unavoidable. Consistent with this conclusion, plaintiff has admitted to regularly using the stairs "several times per day" without tripping for over two years. Additionally, the hazard was not unreasonably dangerous. The example the Supreme Court gave for an unreasonably dangerous condition consisted of "an unguarded 30-foot deep pit in the middle of a parking lot." *Id.* at 518. There is no doubt that someone "interacting with" (i.e., walking into) a 30-foot deep pit would be virtually guaranteed of suffering severe injury, harm, or even death. The same cannot be said with someone "interacting with" the chipped-tile hazard in the present case. Here, it is conceivable that one could walk over the chipped-tile area many times and not trip at all, let alone trip and fall down the stairs, and this, in fact, was plaintiff's experience for over two years. Furthermore, falling down the stairs at issue here does not represent the same risk of death or injury that falling down a 30-foot deep pit does. Therefore, no "special aspects" existed with respect to the chipped tile at the top of the staircase.

The trial court correctly determined that the condition was both open and obvious and lacking in special aspects that gave rise to a duty on the part of defendant. Accordingly the trial court did not err when it granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio

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other documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(5). Moreover, our de novo review shows that they were sufficiently clear to show that the hazard was not essentially unavoidable.